United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7008 76-7008

~~75-8375~~

To be argued by
JARED SPECTHRIE

United States Court of Appeals
For the Second Circuit

B

P/S

MONROE KORN,

Plaintiff-Appellant,

against

FRED H. MERRILL, REID W. DENNIS, S. WALDO COLEMAN, HERBERT E. DOUGALL, WALLACE H. FULTON, WILLIAM WALLACE MEIN, JR., GEORGE E. OSBORNE, PHILIP A. RAY, and RICHARD F. THARP,

JOHN DOE 1 to JOHN DOE 1,000 (Fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who in 1968 exchanged stock of The Fund American Companies for stock of American Express Company,)

FUND AMERICAN COMPANIES, AMERICAN EXPRESS INVESTMENT MANAGEMENT COMPANY, AMERICAN EXPRESS COMPANY, and AMERICAN EXPRESS INVESTMENT FUND, INC.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT MONROE KORN

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MONROE KORN, Plaintiff-Appellant, - against - FRED H. MERRILL, REID W. DENNIS, S. WALDO COLEMAN, HERBERT E. DOUGALL, WALLACE H. FULTON, WILLIAM WALLACE MEIN, JR., GEORGE E. OSBORNE, PHILIP A. RAY and RICHARD F. THARP, JOHN DOE 1 to JOHN DOE 1,000 (Fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who in 1968 exchanged stock of The Fund American Companies for stock of American Express Company), FUND AMERICAN COMPANIES, AMERICAN EXPRESS INVESTMENT MANAGEMENT COMPANY, AMERICAN EXPRESS COMPANY, and AMERICAN EXPRESS INVESTMENT FUND, INC., Defendants-Appellees.	Docket No. 75-8375

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. In granting summary judgment on limitation grounds, dismissing a derivative action brought on behalf of a mutual fund, despite continuing adverse domination and control of the injured corporation by the alleged wrongdoers, who prevented the injured corporation from seeking relief for its injuries, did the District Court erroneously fail to apply established federal equitable tolling doctrine?

2. In determining, without an adequate factual record, that the causes herein accrued out of New York State, did the District Court fail to follow this Court's teachings in Sack v. Low, 478 F.2d 360 (2d Cir. 1973)?

3. In determining, despite ample evidence that most of the activity complained of took place in New York, that the instant causes accrued in California, did the District Court impermissibly make determinations of disputed factual issues on a motion for summary judgment?

4. Was it in error to grant summary judgment before plaintiff had an opportunity for pre-trial discovery on the relevant issues, and before plaintiff had conducted any depositions?

5. Considering that this derivative action was commenced in New York by a long-time New York resident on behalf of a mutual fund with over 2300 New York shareholders, did the application of New York's borrowing statute to invoke a short California statute of limitations violate the underlying policy of the borrowing statute, which is to discourage forum shopping?

6. Considering that of the fourteen defendants, only one was a New York resident, and that defendant was estopped from asserting limitations by virtue of its continuous adverse domination of the injured mutual fund, did application of New

York's borrowing statute violate its purpose of affording New York residents protection from foreign forum shoppers?

7. In predicting what a New York Court would decide as to the place of accrual of this action, did the District Court err in failing to consider Ripley v. International Railways of Central America, 8 N.Y.2d 430, 209 N.Y.S.2d 289 (1960), where the New York Court of Appeals refused to apply its borrowing statute so as to bar a stockholder derivative action with facts strikingly similar to those here, and in failing to consider New York's flexible solution of choice of law problems so as to protect its resident investors?

8. Did the District Court err in disregarding that congressional intent to protect the public through the Federal securities laws is best effectuated by choosing a longer statute of limitations where one is available?

STATEMENT OF THE CASE

Preliminary Statement

This is an appeal from an order of summary judgment dismissing plaintiff's derivative action,* and jurisdiction for this appeal is based upon 28 U.S.C. §1291.**

Plaintiff, who has been a New York resident continuously since at least 1955 (93a), commenced this action on April 29, 1974 derivatively on behalf of American Express Investment Fund Inc. ("Fund"), a mutual fund. The complaint sought to recover for Fund profits received by the Fund's investment advisor, which were allegedly in breach of its fiduciary duty, because they were received in connection with the advisor's transfer of a lucrative investment advisory contract.*** See generally, Rosenfeld v. Black, 445 F.2d 1337 (2d Cir. 1972).

The complaint also alleges that a proxy statement

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* The decision is reported in CCH Fed.Sec.L.Rep. ¶95,355, p. 98,764 (S.D.N.Y. 1975).

** 28 U.S.C. §1291 provides:

> "Final Decisions of District Courts
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

*** The complaint alleges that these acts constituted violations of the Investment Company Act of 1940, 15 U.S.C. §80a-1 et seq., the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq., the Investment Advisers Act of 1940, 15 U.S.C. §80b-1, and the rules and regulations promulgated pursuant to each of these statutes. (4a).

issued to the Fund's shareholders in connection with the sale of advisory status was false and misleading (11a-13a), and that the advisory and underwriting fees paid by Fund thereafter were paid illegally and should be returned to Fund (11a). The complaint alleges that such payments constitute wrongs which continued at least until the commencement of this action (172a).*

Early in this litigation, prior to any pre-trial discovery, defendants moved for a change of venue pursuant to 28 U.S.C. §1404 (87a-106a). In connection with that motion, plaintiff served interrogatories limited to facts relevant thereto (53a-58a), and defendants responded thereto (59a-86a). The interrogatories showed that substantial portions of the activities complained of occurred in New York, that material witnesses and documents were located in New York, and for those reasons, the District Court denied the motion. (95a-106a)

Those limited interrogatories are the only pre-trial discovery had in this matter to date. Before any opportunity for further interrogatories or depositions, defendants moved for judgment on the pleadings, or in the alternative, summary judgment, on the alleged ground that the causes of action alleged herein were barred by time limitations of California law (107a-130a). This appeal is from the order (147a-175a) granting that motion.

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* See note **, supra, at p. 4.

Defendants' claim that the action was barred by the statute of limitations was peculiarly inappropriate. As demonstrated below, the Board of Directors of the injured corporation on whose behalf this action was brought was adversely dominated and controlled by a majority of directors who are defendants herein and are alleged to have participated in the wrongs. Having successfully been able to cause the injured corporation to refrain from seeking redress for many years, defendants were in the position of attempting to thus immunize themselves and profit from their own wrongdoing, contrary to federal equitable principles explained below.

Because the statutory provisions alleged to be violated contained no separate limitations, the District Court was required to look to the law of the forum state in New York with respect to limitations, including its borrowing statute (156a).

New York's borrowing statute, CPLR §202 states:

"202. Cause of action accruing without the state.

An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply."

There are two requirements in order to invoke New York's borrowing statute. First, the cause must have accrued

to a non-resident. Notwithstanding that plaintiff was a long-time resident, the District Court ruled that the cause of action did not accrue to him, but to the injured corporation, a non-resident, in whose shoes plaintiff stood (158a-163a).

The second requirement for invoking New York's borrowing statute is that the cause of action accrued without the State. This Court has characterized the place of accrual test as "'ambiguous' if not 'entirely unworkable'", and stated that because of that, it could not be fully confident as to the accuracy of a prediction as to what the New York courts would do in any particular situation. George v. Douglas Aircraft Co., 332 F.2d 73, 79 (2d Cir.), cert. denied, 379 U.S. 904 (1964). Judge Gurfein has also stated that prophesying where a cause of action accrued for purposes of the New York borrowing statute was "indeed difficult, particularly when the recent choice of law cases have been decided by votes of four to three in the New York Court of Appeals." Nielson v. Avco Corporation, 54 F.R.D. 76, 81 (S.D.N.Y. 1971).

The most recent pronouncement of the Circuit on the subject is found in Sack v. Low, 478 F.2d 360 (2d Cir. 1973), which also recognizes the difficulty in determining the place of accrual of an action for purposes of New York's borrowing statute. In Sack, this Court stressed the crucial importance in having an adequate factual record for purposes

of determining the place of accrual of the action.

If the causes were deemed to accrue in New York, they would have been timely asserted here under New York's longer statute of limitations, because the borrowing statute would be inapplicable and defendants' motions would have failed. (157a-158a) In granting summary judgment dismissing the complaint, the District Court determined that the instant causes of action accrued in California. It decided that complex and difficult question, despite the almost complete absence of the sort of factual record which Sack instructs must exist to support such a finding. In addition, the District Court's grant of summary judgment disregarded the factual issues raised by its prior finding that substantial activities had occurred in New York. It also disregarded plaintiff's lack of opportunity for adequate pre-trial discovery to establish a proper factual record to oppose the motion.

The District Court purported to base its finding upon Sack, supra, without taking into account the important factual and policy distinctions between that case and the instant one. For instance, plaintiff here was a long-time New York resident (93a), whereas Sack was an obvious forum shopper. In addition, application of New York's borrowing statute in Sack furthered New York's policy of protecting

its resident defendants through a short statute of limitations. In contrast, application of the borrowing statute here will frustrate New York's policy of protecting its resident investors, who are shareholders of the injured corporation. In addition, the District Court failed to consider that Sack was basically a fraud action, whereas the instant action is primarily based upon breach of fiduciary duties.

Background Facts

Fund was a mutual fund with shareholders located throughout the country, of whom 2,345 were New York residents at about the time this action commenced (151a). Plaintiff, also a New York resident, had purchased his shares in Fund in 1955 and still owns them. (93a)

Fund's investment advisor was Fund American Investment Management Company ("FAIMCO") (now known as the American Express Investment Management Company). FAIMCO was a wholly owned subsidiary of Fund American Company (the Parent). FAIMCO acted as Fund's advisor pursuant to an advisory agreement under which FAIMCO was to render investment advice to Fund, and provide various management services in consideration of an annual advisory fee of 1/2 of 1% of the average daily net assets of Fund up to $150 million, and 4/10 of 1% of the net assets in excess of that figure. (6a) As of the date of the wrongs herein alleged, Fund had net assets of

$192 million (5a), so that annual fees approached $1 million. (116a) In addition, FAIMCO acted as Fund's principal underwriter for the continuous public sale of Fund's stock. (6a)

The American Express Company ("AMEXCO") wished to take over this contract. Negotiations leading to the takeover took place largely in New York, where AMEXCO, a New York corporation, was located. (59a-63a) AMEXCO's attorneys and accountants who worked on the negotiations also were based in New York. (66a) The record indicates that of the thirty-one meetings held in connection with the negotiation and consummation of the sale, twenty were held in New York, eight in San Francisco, and three in Washington, D.C. (60a-63a) FAIMCO and its parent were organized and had principal offices in California, but FAIMCO also had a New York office during the period. (137a)

The negotiations led to a transfer of FAIMCO's lucrative advisory contract to AMEXCO. This was accomplished by causing an AMEXCO subsidiary to purchase for stock all of the assets of FAIMCO's parent, which of course included FAIMCO. (7a) The complaint alleges that a significant portion of the purchase price was paid by AMEXCO for the privilege of controlling or becoming the advisor and principal underwriter of Fund (8a), and that such portion of the purchase price should have gone to Fund and its shareholders, either directly or through a reduction of the advisory fees

payable by Fund. (10a) The complaint alleges that the receipt of profits upon sale of the advisory contract was in breach of FAIMCO's fiduciary duty, see generally, Rosenfeld v. Black, supra, and that AMEXCO participated in and encouraged said breach of fiduciary duties. (10a)

The agreement by which AMEXCO accomplished the takeover was made dependent upon the fulfillment of two conditions precedent: (1) that the Fund shareholders approve reinstatement of the advisory agreement between Fund and FAIMCO after the AMEXCO takeover; and (2) that the Fund Board of Directors approve reinstatement of the Fund-FAIMCO underwriting agreement. (8a) The complaint alleges that the parties to the takeover of FAIMCO, its officers, directors and its parent and its officers and directors undertook to use their best efforts to secure reinstatement of the advisory agreement by the shareholders of Fund and the reinstatement of the underwriting agreement by the Board of Directors of Fund. (8a) Pursuant to that understanding, it is alleged that management of Fund, in accordance with recommendations of FAIMCO and its parent, issued a proxy statement in connection with its annual meeting with the purpose of obtaining stockholder approval of reinstatement of the advisory agreement after AMEXCO's takeover. (8a) The complaint alleges that the proxy soliciting approval of

reinstatement of the advisory contract was misleading in that it failed to reveal that Fund and its stockholders were entitled to the profits arising from defendants' sale of the advisory position (11a), that the proxy failed to reveal that the excess consideration paid by AMEXCO for its purchase of the advisory office, was in fact and in law, an asset of the Fund and not an asset of FAIMCO or its parent, and related matters. (12a)

The complaint alleges that the proxy statement was mailed to plaintiff and to the other New York shareholders of Fund, who received said proxy statement by mail in New York State. (9a)

POINT I

THE STATUTE OF LIMITATIONS OF EACH STATE WHOSE LAWS MIGHT APPLY WERE TOLLED BY ADVERSE DOMINATION OF THE INJURED CORPORATION

The complaint alleges that the Board of Directors of the mutual fund on whose behalf this suit is brought, at the time the suit was commenced, was controlled and adversely dominated by persons who were directors at the time of the transactions complained of, and who "participated therein with knowledge or notice of their illegality, and are liable therefor," and who are defendants herein. (13a) The complaint further alleges that other Fund directors were officers or directors of certain other defendants (13a-14a) and that "the directors of [the mutual] fund are . . . not free of interests adverse to bringing this action." (14a)

Adverse domination of the Board of Fund is amply demonstrated in the vigorous manner in which Fund has attempted to defeat this action, which is brought on its behalf against, inter alia, a majority of its present directors. Accordingly, regardless of whether the New York statute of limitations was applicable, as plaintiffs contend (133a-146a), or whether the applicable statute was that of California as found by the District Court (163a-167a), this action was commenced timely because neither statute had begun to run before the commencement of this action.

It is an accepted federal equitable doctrine that the running of a statute of limitations may be suspended during a period of adverse domination of the injured corporation by the wrongdoers. International Railways of Central America v. United Fruit Co., 373 F.2d 408, 412-416 (2d Cir. 1967); Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 88 (2d Cir. 1961); Michelsen v. Penney, 135 F.2d 409, 415 (2d Cir. 1943); Dabney v. Levy, 191 F.2d 201 (2d Cir. 1951); Saylor v. Lindsley, 302 F.Supp. 1174 (S.D.N.Y. 1969).

The reasons for this federal tolling doctrine are cogently stated in Saylor v. Lindsley, supra, at 1184:

> "The rationale is that if the wrongdoers by virtue of their control of corporate decision-making have foreclosed the possibility that the corporation might bring suit, then they should not reap benefit from their position of domination and during such time the corporation should not be held to account for the delay in instituting suit."

That rationale is appropriate here. If this Court affirms the dismissal of the case on statute of limitations grounds, it will permit defendants to establish immunity for their wrongdoing by virtue of their causing Fund to refrain from suing the defendants, some of whom constitute a majority of Fund's Board of Directors. In addition, allowing such conduct would permit defendants to frustrate the purposes of the federal securities laws by virtue of their control of the

injured party. Because adverse domination rests upon notions of undue influence and duress, it stands apart from the doctrine of fraudulent concealment. International Railways of Central America v. United Fruit Co., supra, 373 F.2d at 414; Moviecolor Ltd. v. Eastman Kodak Co., supra, 288 F.2d at 88; Saylor v. Lindsley, supra, 302 F.Supp. at 1184. Accordingly, time of discovery of the alleged wrongs need not be considered for reasons recognized by this Court in International Railways of Central America v. United Fruit Co., supra, 373 F.2d at 412:

> "Plaintiff, not disputing that sufficient knowledge of the claims existed long before 1961, replies that it would be anomalous to bar the corporation because of a stockholder's or director's failure to do what the former was not bound to do and what neither might be able to do. Pointing to the thirteen years of starvation diet for the stockholders' lawyers in the Ripley action, it stresses the serious practical obstacles to undertaking derivative litigation against a powerful defendant, particularly one controlling the corporation, without the sinews afforded by the corporate treasury."

That rationale is especially appropriate here where the defendants are the very persons who delayed bringing this action. Thus, there is no prejudice to them.

Judge Cooper's opinion in Saylor v. Lindsley supra, holds that the allegations of the complaint with respect to control must be deemed true for purposes of the motions for summary judgment, and at the very least, raise an issue of fact which makes summary judgment inappropriate. 302 F.Supp

at 1185. Cf. Schoenbaum v. Firstbrook, 405 F.2d 215 (2d Cir. 1968). See also Tomero v. Galt, 511 F.2d 504, 509-510 (7th Cir. 1975). In addition, this verified complaint should not have been dismissed if any state of facts provable under the allegations of the complaint would show such control. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

That adverse domination was not expressly argued in the District Court by counsel for whom we were later substituted is no bar to this Court's consideration of the matter. The law in this Circuit, and elsewhere, has long been that issues of great significance in construing an act designed to protect thousands of investors, will be considered, even if raised for the first time, on appeal. Green v. Brown, 398 F.2d 1006 (2d Cir. 1968) was a shareholder's derivative action brought by shareholders in an investment fund under the Investment Company Act of 1940. It thus is strikingly similar to the case at bar. The lower court had dismissed the action upon cross-motions for summary judgment on the ground that no claim for relief was stated under the Investment Company Act of 1940. On the appeal, arguments as to construction of certain sections of the Investment Company Act of 1940 were raised for the first time. This Court remanded the case for further proceedings on the basis of the issues there raised for the first time, stating:

> "While we would not ordinarily be receptive to attempts to litigate issues not raised in the trial court, this appears to be a case calling for relaxation of the usual rule, since the issues now raised are of great significance in construing an act designed to protect thousands of investors."

See also New York, N.H. and H.R. Co. v. Reconstruction Finance Company, 180 F.2d 241, 244 (2d Cir. 1950) (L. Hand, J.).

The same rule, that an appellate court may pass upon issues not raised below when the ends of justice will be best served by doing so, is followed in other circuits as well. Franki Foundation Company v. Alger-Rau & Associates, Inc., 513 F.2d 581 (3d Cir. 1975); O'Neill v. United States, 411 F.2d 139, 143-44 (3d Cir. 1969); Empire Life Insurance Company of America v. Valdak Corporation, 468 F.2d 330 (5th Cir. 1972); American Surety Co. of New York v. Coblentz, 381 F.2d 185 (5th Cir. 1967); In re Linda Coal & Supply Company, 255 F.2d 653 (3d Cir. 1958); Huntress v. Huntress' Estate, 235 F.2d 205 (7th Cir. 1956) (A court may consider and construe a statute determinative of the case which was not specifically called to the attention of the trial court); Federal Deposit Insurance Corp. v. Best, 122 F.2d 765 (6th Cir. 1941), cert. denied, 314 U.S. 696 (1941); Goodcell v. Graham, 35 F.2d 586 (9th Cir. 1929), aff'd, 282 U.S. 409 (1930); Krause v. Sacramento Inn, 479 F.2d 988, 989 (9th Cir. 1973); Toymenka

Inc. v. Mount Hope Finishing Co., 432 F.2d 722, 727 n.10 (4th Cir. 1970).

The rationale for this doctrine has been cogently stated by the Fifth Circuit Court of Appeals:

> "Appellate review does not consist of supine submission to erroneous legal concepts even though none of the parties declaimed the applicable law below. McCrea v. Harris County Houston Ship Channel Navigation Dist., 5 Cir. 1970, 423 F.2d 605, 610; Kurdziel v. Pittsburgh Tube Co., 6 Cir. 1969, 416 F.2d 882, 886; Foster v. United States, 2 Cir. 1964, 329 F.2d 717, 718. See also International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Zantop Air Transport Corp., 6 Cir. 1968, 394 F.2d 36, 40. Our duty is to enunciate the law on the record facts. Neither the parties nor the trial judge, by agreement or passivity, can force us to abdicate our appellate responsibility." Empire Life Insurance Co. of America v. Valdak Corporation, supra, 468 F.2d at 334.

The special importance to the American investing public of the rights which will be protected by thus considering this issue has been recognized by the United States Supreme Court, which has encouraged and lauded derivative suits such as this. Thus, in Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 371 (1966), the Court stated:

> "...derivative suits have played a rather important role in protecting the shareholders of corporations from the designing schemes and wiles of insiders who are willing to betray their company's interests in order to enrich themselves."

Similarly, in Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970):

> "...private stockholders' actions of this sort 'involve corporate therapeutics, and furnish a benefit to all shareholders by providing another means of enforcement of the proxy statute.'"

Because plaintiff in effect represents the corporation and its shareholders who will be irreparably injured if the District Court's dismissal is allowed to stand, and because plaintiff is performing a recognized public service in his prosecution of this action, he should be given great latitude in presenting his appeal.

POINT II

THE DISTRICT COURT DISREGARDED THE TEACHINGS OF SACK V. LOW AS TO THE REQUIREMENT OF AN ADEQUATE FACTUAL RECORD

Sack v. Low, 478 F.2d 360 (2d Cir. 1973) instructs that in order to determine where a cause of action accrued for purposes of New York's borrowing statute, CPLR §202, certain crucial factual determinations must be made. Sack was a securities fraud action. This Court determined that under the facts of that case, the cause accrued in the state where the economic loss occurred to plaintiff.* This Court held that the economic loss is not necessarily in the state where plaintiff resides or is incorporated. This Court found that the factual record in Sack was not sufficiently developed in order to determine where that loss occurred. After prophesying, despite an absence of controlling New York decisional law on the subject, that plaintiff's cause accrued where the economic impact of his loss occurred, Judge Friendly's opinion went on to say:

> "However, even with these general principles as to where the New York courts would hold the cause of action to accrue established, we cannot properly affirm Judge McLean's order on the ground that the cause of action here accrued in Massachusetts. The problem is that the record does not contain sufficient facts to enable us to apply our

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* The instant case is based primarily on breach of fiduciary duty. As demonstrated, infra, the New York Court of Appeals has not stressed the place of loss in deciding where such actions accrue.

> prediction of New York law with complete confidence. We do not know exactly how plaintiffs paid for the securities -- whether by check sent from Massachusetts or in some other fashion; perhaps if the plaintiffs maintained an open account at defendant's New York offices, and the loss was reflected in that account, this might make some difference. Similarly, we do not know the details as to how the securities were handled. Although on what is now before us, it seems unlikely that plaintiffs can demonstrate that the cause of action arose in New York under the traditional test, they should not be foreclosed from an opportunity to do so." Id. at pp. 367-368.

Defendants' motions for summary judgment, were brought early in this litigation, prior to an opportunity for plaintiff to conduct sufficient discovery to develop the sort of facts which this Court felt were necessary in Sack for a determination of the place of accrual of an action. In fact, no depositions whatsoever have been held in this action, and the only discovery conducted were those interrogatories limited to certain issues relevant to a motion by defendants to transfer to California pursuant to 28 U.S.C. §1404. Significantly, the Court denied that motion (Order dated April 7, 1975) (95a-106a) on the grounds that the negotiations leading to the improper sale of FAIMCO's position as investment advisor took place in New York as well as California, that attorneys and accountants who worked on the merger by which the transfer was accomplished were located in New York, and that there were material

witnesses in New York as well as in California. The responses to the limited interrogatories (59a-86a) relevant to the transfer issue squarely demonstrate that significant portions of the negotiations leading to the improper transfer occurred in New York. However, those responses, which were the sole discovery had in this case prior to the court's dismissal, gave no inkling at all as to the relative significance of the various activities shown there, the actual place of transfer of the advisory position, where the contracts were executed, or where the economic impact of such improper transfer was felt. There is nothing on the record to indicate the location of Fund's assets or accounts, or where it might receive monies due to it. These questions are crucial. For instance, if economic impact were found in New York, the longer New York statute would be applied, Sack v. Low, supra, and this action could not have been dismissed.

We submit that the District Court's determination of the place where this cause accrued, on this incomplete record is speculative. It is just the sort of thing which this Court cautioned against in Sack.

POINT III

THE DISTRICT COURT'S DISMISSAL IMPERMISSIBLY DECIDED FACT QUESTIONS. IN ADDITION, IT WAS PREMATURE

A finding that the within cause accrued in California, despite the significant contacts all of the transactions had with New York, necessarily required, at least implicitly, factual determinations of the sort of questions raised by the Sack panel. The serious fact questions involved were inappropriate for summary judgment. Moreover, a grant of summary judgment as to such issues prior to the discovery required by plaintiff for full development of the facts completely ignored this Court's holding in Schoenbaum v. Firstbrook, supra.

In Schoenbaum, supra, this Court taught that "summary judgment should rarely be granted against a plaintiff in a stockholder's derivative action especially when the plaintiff has not had an opportunity to resort to discovery procedures." Schoenbaum, supra, 405 F.2d at 218. See also, Subin v. Goldsmith, 224 F.2d 753 (2d Cir.), cert. denied, 350 U.S. 883, 76 S.Ct. 136, 100 L.Ed. 779 (1955); Colby v. Klune, 178 F.2d 872 (2d Cir. 1949); Fogelson v. American Woolen Co., 170 F.2d 660 (2d Cir. 1948). This Court gave as its reason for such rule that:

> "The plaintiff typically has in his possession only the facts which he alleges in his complaint. Having little or no familiarity with the internal affairs of the corporation, he is faced with affidavits setting forth in great detail management's version of what actions were taken and what motives led the affiants to take these actions. Since the facts in such a case are exclusively in the possession of the defendants, summary judgment should not ordinarily be granted where the facts alleged by the plaintiff provide a ground for recovery, at least not without allowing discovery in order to provide plaintiff the possibility of counteracting the effect of defendants' affidavits." Schoenbaum, supra, 405 F.2d at 218.

Here, where plaintiff has had no opportunity for discovery to develop the answers to the question raised in Sack, and other questions relating to defendants' adverse domination over Fund, summary judgment is inappropriate for the reasons set forth in Schoenbaum, supra, and in Saylor v. Lindsley, supra, 302 F.Supp. at 1185.

POINT IV

NEW YORK COURTS WOULD APPLY THE NEW YORK STATUTE OF LIMITATIONS ON THE FACTS OF THIS CASE

This Court's prediction of what the New York courts might do in the situation presented in Sack v. Low, supra, is not dispositive on the instant facts. Because Sack was factually unlike the instant case, it did not consider Ripley v. International Railways of Central America, 8 N.Y.2d 430, 209 N.Y.S.2d 289 (N.Y. Ct. of Appeals, 1960), affirming 8 App. Div. 2d 310, 188 N.Y.S.2d 62 (1st Dept. 1959). In Ripley, faced with a situation almost identical to that presently here, the New York Court of Appeals allowed the maintenance of a derivative suit on behalf of an out of state corporation which might have been barred if New York's borrowing statute had been applied.

That derivative action was commenced in New York by a group of shareholders (many of whom were non-residents) on behalf of a New Jersey corporation (IRCA) whose principal business was the operation of a railway in Central America. The prime defendant was the United Fruit Co., which allegedly controlled IRCA. The complaint alleged that United Fruit Co. breached its fiduciary duty to IRCA by causing the railroad company to give it preferential rates for the transfer of bananas across Central America.

Defendants sought to invoke the limitations of Guatemalan law which would have barred the action, and to that end, urged that New York's borrowing statute be applied. Although the New Jersey corporation on whose behalf the action was brought was a non-resident of New York, and many of the acts constituting the breach of fiduciary duty took place out of State and affected operations in Guatemala, the New York Court of Appeals refused to permit its borrowing statute to bar the action. Instead, the longer New York limitations were applied, 8 N.Y.2d at _____, 209 N.Y.S. 2d at 292, allowing the action to proceed. Moreover, the New York Court of Appeals allowed damages incurred from 1943 onward arising from a contract executed in breach of United Fruit's fiduciary duty in 1936, six years prior to the cutoff established by the New York limitations, on a theory of continuing wrong. The extent to which New York's highest Court strained to protect the minority shareholders of the injured corporation is demonstrated in Judge Dye's dissent which indicates his belief that the "continuing wrong" concept was artificial and used solely to allow a remedy where a wrong had been done, which would otherwise be barred by New York's time limitations.

The instant complaint's allegation of continuing wrong by virtue of substantial payments pursuant to the advisory contract and its subsequent renewals would, we

submit, require the same result in the New York Courts.

There is no reason to believe that the New York Court of Appeals would depart from that holding on the facts of the instant case. The instant facts provide similar incentive for rejection of rigid application of New York's borrowing statute. The District Court's opinion (95a-106a) and the interrogatory responses of defendants (59a-86a) demonstrate that a substantial portion of the negotiations and other activities constituting the breach of fiduciary duty alleged in the complaint took place in New York State. The activities harmed plaintiff and thousands of other New York residents who were shareholders of the mutual fund on whose behalf this action is brought.

As mentioned, Sack bore little resemblance to the instant facts. In Sack, a Massachusetts resident acting as Trustee for a Massachusetts trust brought an action in New York against defendants who were New York residents. The action was commenced after an earlier action brought by the same plaintiff on the same cause had been dismissed in a Massachusetts court on limitations grounds.

In predicting what the New York courts would do on the same set of facts, this Court predicted that the New York Court of Appeals would apply New York's borrowing statute to bar the action in furtherance of a policy of discouraging non-resident plaintiffs from forum shopping

within this jurisdiction. Accord: National Surety Co. v. Ruffin, 242 N.Y. 413, 152 N.E. 246 (1926).

Moreover, in deciding that New York's borrowing statute might bar the Sack action, the Court of Appeals perceived that one of the primary functions of New York's borrowing statute is to protect New York citizens by giving them as short as possible a statute of limitations in cases where they were defendants. 478 F.2d at 367; George v. Douglas Aircraft Co., 332 F.2d 73, 77 (2d Cir.), cert. denied, 379 U.S. 904 (1964). See also, Baker v. Cohn, 266 App. Div. 236, 41 N.Y.S.2d 765, 768 (1st Dep't 1943).

On the facts of this case, however, application of the borrowing statute would be contrary to the public policies which underlie New York's borrowing statute. Here, the plaintiff was, at the time of the wrongs alleged, and still is, a long-time New York resident. Thus, there is no question of forum shopping. In addition, none of the fourteen defendants except American Express Company* is a New York resident, whose interests were sought to be protected by the enactment of New York's borrowing statute, CPLR 202.

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* American Express, of course, should be equitably estopped from claiming any limitations protection, for it adversely controlled Fund's board and caused it to refrain from seeking relief.

In sharp contrast, over two thousand shareholders of the mutual fund on whose behalf this action is brought are New York residents (151a), whose interests will be irreparably harmed if the borrowing statute is permitted to deny them a remedy for the wrongs alleged. New York has had a long-standing interest in purifying its commercial market places for the protection of its residents.

Because of these considerations, where there is no question of forum shopping, New York courts have acted flexibly so as to permit suit by persons who were not technically New York residents and would be time barred by strict application of the borrowing statute. In Jones v. Greyhound Bus Lines, 73 Misc.2d 109, 341 N.Y.S.2d 159 (Sup.Ct. Orange County, New York, 2/28/73), (which was decided after this Court heard oral argument in Sack v. Low) plaintiff, a Florida domiciliary, suffered an accident in Virginia en route to Newburgh, New York, where she intended to take up residence. The court expressly recognized that plaintiff was not a New York resident when the cause accrued. Yet it refused to apply New York's borrowing statute in a mechanical fashion to bar the action, which was already barred under the statute of limitations in Virginia, where the accident occurred, stating:

> "Since New York's borrowing statute was specifically designed to prevent non-residents from shopping for the forum with the most favorable Statute of Limitations (Boutin v. Cumbo, D.C., 259 F.Supp. 12) the Court believes that to mechanically apply the statute under these unique circumstances, when there is no question of forum shopping and no evidence of prejudice to defendant would be unjust and contrary to the Legislative intent." Id. at p. 161.

That decision is consistent with the decision of New York's Court of Appeals, in Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743 (1963), which demonstrates New York's judicial rejection of rigid rules as a sensible approach to solving choice of law problems. Sack v. Low, 478 F.2d at 367. It is significant that New York's Court of Appeals decided Ripley v. International Railways of Central America, supra, at a time when it followed the more rigid traditional approach with respect to conflicts questions. With its present expressed policy of applying New York law where there are substantial New York interests to protect, see, e.g., Babcock v. Jackson, supra; Tooker v. Lopez, 24 N.Y.2d 569, 301 N.Y.S.2d 519 (1969); J. Zeevi and Sons, Ltd. v. Grindlays Bank (Uganda) Limited, 37 N.Y.2d 220, 371 N.Y.S.2d 892, 898 (1975); Intercontinental Planning v. Daystrom, Inc., 24 N.Y.2d 372, 383-384, 300 N.Y.S.2d 817, 826-827 (1969), it would have even more reason to reject the concept of utilizing New York's borrowing statute to the detriment of the substantial interests of thousands of its residents.

POINT V

CONGRESSIONAL POLICY TO PROTECT THE INVESTING PUBLIC SUGGESTS USE OF A LONGER STATUTE OF LIMITATIONS

The federal appellate courts have stated that Congressional intent to protect the public through the Federal securities laws is best effectuated by choosing a longer, rather than a shorter, statute of limitations where such a choice is available. Berry Petroleum Co. v. Adams and Peck, 518 F.2d 402 (2d Cir. 1975); United Bank of California v. Salik, 481 F.2d 1012, 1015 (9th Cir. 1973); Azalea Meats v. Muscat, 386 F.2d 5, 8 (5th Cir. 1967). As stated in Sargent v. Genesco, Inc., 352 F.Supp. 66, 76 (M.D. Fla. 1972):

> "It is important, however, to note, though gratuitously, that conceptually the gravamen of an action brought under section 10(b) of the Securities Exchange Act of 1934 is fraud and that a state statute of limitations should not be permitted to narrow the filing time available under a broadly remedial federal act to a period less than the one available for commencing a similar common-law action. This we believe to be the import of the holding of the Supreme Court that: 'A fundamental purpose, common to those statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.' S.E.C. v. Capital Gains Bureau, 375 U.S. 180, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963)."

See also Judge Lasker's recent statement in Lank v. New York Stock Exchange, CCH Fed.Sec.L.Rep. ¶95, 395, p. 99,013 (S.D.N.Y. 1975):

> "Moreover, absent a specifically indicated statute of limitations, a federal court ought not to ignore considerations of federal policy and of justice in determining which statute is to be applied."

Sack's departure from this rationale may be justified as a means to discourage forum shopping, but that consideration is not relevant to this case.

It is respectfully submitted that where this Court is faced with predicting what a New York court might do under circumstances which render a prediction uncertain, the overriding federal policy to protect all our citizens from questionable business ethics should be given great weight.

CONCLUSION

For the foregoing reasons, the order of the District Court granting summary judgment should be reversed.

Dated: New York, New York
March 29, 1976

Respectfully submitted,

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COUNTY OF NEW YORK)

CLARENCE GRANZA being duly sworn, deposes and says:

1. Deponent is not a party to the action, is over the age of 18 and resides at 60 South 3rd Street, Brooklyn, N.Y.

2. That on April 2, 1976, he served two copies of the Brief of Plaintiff-Appellant Monroe Korn upon the offices of the following attorneys in the within action by delivering a copy thereof personally, to the person in charge of said office:

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Sworn to before me this
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Monroe D. Rosen
Notary Public

MONROE D. ROSEN
Notary Public, State of New York
No. 24-4616690
Qualified in Kings County
Commission Expires March 30, 1977

Service of ~~three~~ Two (2) copies of the within
is admitted this 2 day of April 1976

(2) COPY RECEIVED
4-2 1976
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By Clarice A Lorenzo